UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSEMARY MAY OKERE, Petitioner, v. MICHAEL CHERTOFF, et al., Respondents.	CASE NO. C07-1267-RAJ REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Rosemary May Okere, proceeding through counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, arguing that her continued detention by the U.S. Immigration and Customs Enforcement ("ICE") violates the equal protection clause of the United States Constitution because she suffers from acute medical problems.[1] (Dkt. #1 at 2). Petitioner

[1] This is the second habeas petition petitioner has filed in this Court. On July 28, 2006, the Honorable Robert S. Lasnik, Chief United States District Judge, denied her first habeas petition. *See Okere v. Gonzales*, C06-292-RSL (Dkt. #21). Petitioner subsequently filed a Petition for Review of the denial of her habeas petition in the Ninth Circuit Court of Appeals. On March 5, 2007, the Ninth Circuit affirmed in part and dismissed in part the petition for review, and the mandate issued on July 19, 2007. See *Okere v. Gonzales*, No. 06-35710 (9th Cir. 2006).

asserts that she suffers from high blood pressure, anxiety, post traumatic stress disorder, and anemia, and that she "deserves a change in situation on account of her deteriorating health condition." (Dkt. #22 at 2). The Government argues that petitioner's health does not require her release because she is receiving appropriate medical treatment and has declined to take advantage of some medical treatment available to her. (Dkt. #18 at 1-2).

After careful review of the entire record, I recommend that petitioner's habeas petition be denied and that this action be dismissed with prejudice.

II. FACTS

Petitioner is a native and citizen of Nigeria who was admitted to the United States on May 8, 1995, as a B-2 visitor with authorization to remain in the United States until December 7, 1995. (*Okere v. Gonzales* , C06-0292-RSL-JPD, Dkt. #15 at R108, L518). On March 15, 1996, petitioner filed an application for asylum. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at R1-10). On October 31, 2000, an asylum officer conducted an interview of petitioner and determined that she was not eligible for asylum and referred her case to an Immigration Judge ("IJ") for review. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L23-24). On November 1, 2000, the former Immigration and Naturalization Service[2] ("INS") issued a Notice to Appear, placing petitioner in removal proceedings and charging her with removability under Section 237(a)(1)(b) of the Immigration and Nationality Act ("INA") for remaining in the United States longer than permitted. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L428-29).

[2] Effective March 1, 2003, the Immigration and Naturalization Service was abolished pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, *codified at* 6 U.S.C. § § 101, *et seq.*, and its immigration functions were transferred to the Department of Homeland Security ("DHS").

In removal proceedings, petitioner, proceeding through counsel, admitted the allegations contained in the Notice to Appear and conceded removability, but applied for asylum, withholding of removal, and withholding under the Convention Against Torture ("CAT"). (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L428). On October 8, 2002, the IJ denied petitioner's application for relief, and ordered her removed to Nigeria. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L393-429). Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1004-1006, L629).

On January 26, 2003, petitioner married Shune Arnold, a United States citizen. On March 17, 2003, petitioner filed a motion with the BIA to reopen and remand her removal proceedings to the Immigration Court so that she could apply for adjustment of status based on her marriage to a United States citizen.[3] (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L880-81, L619).

On March 25, 2003, the BIA issued a briefing schedule, indicating that petitioner's appeal brief must be received no later than April 15, 2003. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L629). On April 8, 2003, petitioner's counsel filed a request for an extension of time to file an appeal brief. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L631). The BIA granted petitioner until May 6, 2003, to file her appeal brief. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L634-35). On or about July 30, 2003, petitioner's counsel submitted an appeal brief to the BIA along with a motion for consideration of the late filed brief. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L642-

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[3] On February 23, 2004, Mr. Arnold, filed a Petition for Dissolution of Marriage in the Superior Court of Washington for Pierce County. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1187-1196). On October 5, 2005, DHS received a letter from Mr. Arnold, claiming that his marriage to Ms. Okere was a "fake" for "Immigration only," and that he wanted to withdraw his I-130 relative immigrant visa petition. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1033). Mr. Arnold indicated that he had moved to California after filing the Petition for Dissolution of Marriage and never completed the dissolution. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1033).

651).

On March 22, 2004, the BIA dismissed petitioner's appeal for failing to file a timely appeal brief. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L880-81). In addition, the BIA denied petitioner's motion to reopen and remand, finding that petitioner had failed to provide sufficient evidence of the bona fides of her marriage. *Id*. On May 20, 2004, however, the BIA reopened the proceedings and remanded the case to the IJ for consideration of petitioner's application for adjustment of status. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L735).

On June 7, 2004, petitioner filed a motion to change venue from Dallas, Texas to Seattle, Washington, which the IJ denied. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1132-34). On June 28, 2004, petitioner failed to appear for her scheduled hearing and the IJ ordered her removed *in absentia*.[4] (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L777, L775). Petitioner appealed the IJ's decision to the BIA, who affirmed the IJ's decision on March 10, 2005. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L819).

On June 7, 2005, petitioner, proceeding pro se, filed a motion to reopen and reconsider the BIA's March 10, 2005, decision based on ineffective assistance of counsel. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L839-842). Petitioner alleged that she was unaware that the initial appeal to the BIA was dismissed for failure to file an appeal brief, and was unaware of the June

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[4] The IJ stated as follows:

> At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and conceded removability. I find removability established as charged. . . . I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file.

(Dkt. #15 at L777, L775).

28, 2004, immigration hearing until she arrived at her attorney's office on the morning of the hearing. Petitioner further alleged that she had filed a grievance with the Washington State Bar Association against her former attorney. *Id*. On August 1, 2005, the BIA denied petitioner's motion to reopen and reconsider as untimely. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L861).

On August 29, 2005, ICE issued a "Bag and Baggage" letter (surrender notice), directing petitioner to report for removal to Nigeria on September 28, 2005. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at R86). On September 7, 2005, petitioner filed an Application for Stay of Removal, stating that she had filed a Petition for Review in the Fifth Circuit Court of Appeals. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at R85). On September 28, 2005, petitioner reported for removal and was taken into immigration custody, however, the ICE Field Office Director granted petitioner a stay of removal until October 13, 2005. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at R95-96, R43, R109, R120).

On October 7, 2005, petitioner filed a Petition for Review and a motion for stay of removal with the Ninth Circuit Court of Appeals. *Okere v. Gonzales*, No. 05-75792 (9th Cir. Oct. 7, 2005). Under Ninth Circuit General Order 6.4(c)(1), this cause a temporary stay of removal to automatically issue. On November 8, 2005, the Fifth Circuit dismissed petitioner's Petition for Review for lack of jurisdiction. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at R127). On February 24, 2006, the Ninth Circuit dismissed petitioner's Petition for Review for lack of jurisdiction, finding that proper venue was in the Fifth Circuit because petitioner's removal proceedings were held before the Immigration Court in Dallas, Texas. (*Okere*, C06-0292-RSL-JPD, Dkt. #15 at L1234-35); *Okere v. Gonzales*, No. 05-75792 (9th Cir. Oct. 7, 2005).

On March 2, 2006, petitioner filed a Petition for Writ of Habeas Corpus in this Court,

challenging her order of removal. The Court denied and dismissed the habeas petition on July 28, 2006. *See Okere v. Gonzales*, C06-0292-JPD-RSL (W.D. Wash.). Petitioner then appealed this Court's denial of her habeas petition to the Ninth Circuit Court of Appeals. *See Okere v. Gonzales*, No. 06-35710 (9th Cir. filed Nov. 11, 2006). Petitioner also requested a stay of removal, which caused a temporary stay of removal to automatically issue. *Id.* The Ninth Circuit rejected petitioner's Petition for Review and the mandate issued on July 19, 2007. *Id.*

On August 15, 2007, petitioner filed the instant habeas petition, seeking release from detention based on her medical condition. (Dkt. #1). At the same time, petitioner also filed a Motion for Stay of Removal pending review of her habeas petition. (Dkt. #2). On August 16, 2007, the undersigned Magistrate Judge issued a Report and Recommendation ("R&R"), recommending that petitioner's motion for stay of removal be denied because she had failed to demonstrate that she is entitled to health-related release. (Dkt. #5). The Honorable Ricardo S. Martinez adopted the R&R, denying petitioner's motion for stay of removal. (Dkt. #16).

III. DISCUSSION

Petitioner requests that she be released on bond because she suffers from medical conditions which are aggravated by her confinement. Petitioner submitted documentation indicating that she suffers from acute stress disorder, high blood pressure, anxiety, post traumatic stress disorder, and anemia. (Dkt. #1 at 5). Respondents argue that petitioner is receiving appropriate medical treatment, and that her medical conditions do not warrant release from ICE custody. (Dkt. #18 at 4). Respondents submitted a Declaration from Philip Farabaugh, M.D., Clinical Director of the Northwest Detention Center in Tacoma, Washington, who has been treating petitioner. (Dkt. #18, Dkt. #13). Dr. Farabaugh states,

> 5. [Petitioner] suffers from severe anxiety and post traumatic stress disorder related to events in Nigeria as well as the United States. Because of these psychiatric conditions, she has had a very difficult time dealing with the lack of privacy and loss of liberty associated with administrative detention while appealing her deportation order. She is deeply suspicious and fearful of many of the staff and other detainees.
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> 6. [Petitioner has been housed temporarily in the medical infirmary during periods of severe anxiety to help her better cope with her detention. She has been housed in a single cell in the female dormitory from February 14, 2006 until April 5, 2006. It was discussed that this would be a temporary arrangement to help her adjust to the detention setting; unfortunately, she continues to have difficulties. [Petitioner] continues to desire a single cell housing which cannot be accommodated due to population constraints in the facility. She has not been interested in seeing the psychiatrist regularly or taking psychiatric medication that could help her better control her anxiety.

(Dkt. #13, Declaration of Philip Farabaugh, M.D.; Dkt. #10 at 19, medical note by Dr. Farabaugh ("due to space limitations, special needs for individual room needs to be rescinded. pt has been here 7 months and should be adjusting to setting. will encourage pt to select her own roommate.")).

The evidence submitted by respondents and petitioner indicate that petitioner is receiving adequate medical care for her medical problems. (Dkt. #10 at 9-29; Dkt #13). Accordingly, no further action is needed by the Court. Furthermore, "it is a well-settled general principle that a habeas petition is the appropriate means to challenge the 'actual fact or duration' of one's confinement, . . . whereas a civil rights claim is the proper means to challenge the 'conditions' of one's confinement." *Kamara v. Farquharson*, 2 F. Supp. 2d 81, 89 (D. Mass. 1998). Thus, petitioner's claim that she has received inadequate medical care and treatment is more properly brought as a Bivens action. *Id.* (noting that a claim of inadequate medical treatment while in custody is ordinarily brought as a civil rights or Bivens action). Accordingly, petitioner's request that she be released from detention on the basis of her medical conditions should be denied.

Petitioner also argues for the first time in her Objections to the first Report and Recommendation, Dkt. #10, that she is entitled to release under *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). As petitioner has not properly raised this argument in either her habeas petition or any other briefing before the undersigned Magistrate Judge, the Court need not address this claim. Nevertheless, the Court finds that *Zadvydas* does not require petitioner's release.

Section 241(a)(1)(A) of the INA states that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). S*ee also Thai v. Ashcroft*, 366 F.3d 790, 793 (9th Cir. 2004)(citing *Xi v. INS*, 298 F.3d 832, 834-35 (9th Cir. 2002)("When a final order of removal has been entered against an alien, the Government must facilitate that alien's removal within a 90-day 'removal period.'"). The removal period begins on the latest of the following:

> (i) The date the order of removal becomes administratively final.
>
> (ii) <u>If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order</u>.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B)(emphasis added); s*ee also Khotesouvan v. Morones*, 386 F.3d 1298, 1300 n.3 (9th Cir. 2004) (stating that the 90-day removal period commences on "the date the order of removal becomes final; the date a reviewing court lifts its stay following review and approval of the order of removal; or the date the alien ordered removed is released from non-immigration related confinement."). During the removal period, continued detention is required.

INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien."). Under Section 241(a)(6), the Attorney General may detain an alien who has been determined by the Attorney General to be a risk to the community or unlikely to comply with a removal order beyond the 90-day removal period. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

In *Zadvydas*, the Supreme Court considered whether this post-removal-period statute, INA § 241(a)(6), authorizes the government "to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal." *Zadvydas*, 533 U.S. at 682. The petitioners in *Zadvydas* could not be removed because no country would accept them. Thus, removal was "no longer practically attainable," and the period of detention at issue was "indefinite" and "potentially permanent." *Id.* at 690-91. The Supreme Court held that INA § 241(a)(6), which permits detention of removable aliens beyond the 90-day removal period, does not permit "indefinite detention." *Id.* at 689-697. The Court explained that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court further held that detention remains presumptively valid for a period of six months. *Id.* at 701.

After this six-month period, an alien is eligible for conditional release upon demonstrating "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. The burden then shifts to the Government to respond with sufficient evidence to rebut that showing. *Id.* at 701. The six-month presumption "does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

In the present case, the Ninth Circuit mandate issued on July 19, 2007, thereby commencing the removal period. *See* INA § 241(a)(1)(B)(ii). Accordingly, petitioner's ninety-day removal period expired on or about October 19, 2007, and the six month presumptively reasonable period will expire on or about January 19, 2008. As petitioner is within the presumptively valid removal period, her detention is lawful and the Court must deny habeas relief. *See Zadvydas*, 533 U.S. at 701.

IV. CONCLUSION

For the foregoing reasons, I recommend that petitioner's habeas petition, Dkt. #1, be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of January, 2008.

Mary Alice Theiler
United States Magistrate Judge